No. 91-784

In The

Supreme Court of the United States

October Term, 1991

RICHARD T. CARPENTER, JR.,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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QUESTION PRESENTED

When, on remand, the petitioner was resentenced for a lesser included offense and the sentence imposed was thirty years shorter, but proportionately more harsh, than his original sentence, were his due process rights violated under *North Carolina v. Pearce*, 395 U.S. 711 (1969)?

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The State of Connecticut, respondent, hereby opposes the petition for a writ of certiorari to the Supreme Court of Connecticut, seeking review of the judgment of that Court entered in this proceeding on August 20, 1991. Reargument was denied by that Court on September 19, 1991.

OPINION BELOW

The opinion of the Supreme Court of Connecticut is reported at 220 Conn. 169, ___A.2d___ (1991), and is reproduced in the petitioner's appendix at A-1 through A-8. The Court's order denying reargument is set forth in the petitioner's appendix at A-9.

STATEMENT OF THE CASE

A. Procedural History

The petitioner was found guilty of murder; Conn. Gen. Stat. §53a-54a; after a trial in the New Haven Judicial District before the court (Quinn,J.) and a jury. On January 13, 1989, the court sentenced him to fifty years in prison.

Petitioner appealed to the Connecticut Supreme Court, which reversed with direction that the trial court modify the judgment to reflect a conviction of manslaughter in the first degree in violation of §53a-55(a)(3) and to resentence the petitioner in accordance with that direction. *State v. Carpenter*, 214 Conn. 77, 87, 570 A.2d 203 (1990) (*Carpenter I*). Justice Covello dissented. *Id.*, at 87. On September 28, 1990, the trial court (Quinn,J.) resentenced

the petitioner to twenty years in prison for the manslaughter. On October 4, 1990, the petitioner appealed the modified judgment and the trial court subsequently articulated the reasons for its twenty year sentence in response to the state's motion. *See* Pet. App. at A-10.

On August 20, 1991, the Connecticut Supreme Court unanimously affirmed the trial court judgment. *State v. Carpenter*, 220 Conn. 169, ___A.2d___ (1991)(*Carpenter II*). That Court then, on September 19, 1991, denied the petitioner's motion for reargument. Pet. App. at A-9.

B. Facts Underlying The Petitioner's Conviction

The facts underlying the petitioner's conviction are set forth in *Carpenter I*, 214 Conn. at 79-81:

> The victim in this case, Cassandra Demming, an eighteen month old baby, had been in the custody of the defendant and his wife since September 15, 1987, because the baby's mother was incarcerated. On December 31, 1987, the baby was suffering from a cold and diarrhea. Around noon of that day, the defendant left the baby in the care of a teenage relative and went out for the evening. The babysitter spent the night at the Carpenters' home.
>
> The next morning, when the babysitter awoke, he heard the baby crying. He immediately went to

her room and noticed that she had vomited in her crib. The baby was sick all that day, suffering from congestion and diarrhea. The babysitter stayed with the baby until some members of the Carpenter family returned to the house at approximately 4:15 p.m., January 1, 1988, New Year's Day. The defendant did not return until around 5 p.m. Shortly thereafter, the babysitter and some other family members left. When the baby's grandfather, Norman Demming, left at approximately 6:30 p.m. the defendant was alone with the baby who was lying in her crib. At 6:42 p.m., the defendant called the fire department and reported that the baby was having difficulty breathing. When the firefighters arrived, the defendant was outside waiting for them. He directed them to the bathroom where they found the baby unconscious and covered with vomit in the bathtub. James Kenny, a Wallingford firefighter, quickly checked the baby, picked her up and started mouth to mouth resuscitation. As the firefighters were leaving, the defendant told them that the baby had fallen out of her crib.

The defendant accompanied the baby as she was transported by ambulance to Memorial Hospital in Meriden. later, after the doctors diagnosed that the baby had a parietal skull fracture, she was transported by helicopter to Yale-New Haven Hospital and placed on a life support system. The next morning, the baby was pronounced brain dead and thereafter removed from life support. William Hellenbrand, the examining physician at Yale-

New Haven Hospital, found bruises over the baby's back and her face swollen. He also testified that the skull fracture that killed the baby was caused by her being thrown physically, rather then just falling or being dropped.

The autopsy conducted by Harold Carver, deputy chief medical examiner, revealed bruised and swollen tissue around the lips and eyes, a fractured skull and five fractured ribs. Carver testified that the lethal injury to the skull was caused by a single blow of "fairly great force." The doctor opined that the injuries could have occurred when someone threw the baby onto a hard, smooth surface. He also testified that the baby's ribs were broken by a "fairly significant force" which occurred around the same time as the skull fracture. In Carver's opinion, the ribs could have been broken either by being struck with a fist or by being shaken violently. Carver, in the course of his examination, also discovered another head injury, not related to the cause of death, that was at least six weeks old.

What transpired during the short period of time in which the defendant was left alone with the baby is unclear. The only evidence presented by the state was the varying accounts of incidents given by the defendant to the police. The defendant first told authorities that the baby had fallen from her crib and that, in taking her to the bathroom to revive her, he had accidentally hit her head against a door. Later, the defendant volun-

> tarily went to the police station to discuss the incident. While there, he repudiated the story of striking the baby's head against a door and stated instead that he had slipped and had fallen on the baby while carrying her to the bathroom and that he had also banged her head several times in an attempt to resuscitate her. Carver rejected these explanations given by the defendant. He testified that he could not conceive of how the injuries could have been caused accidentally in those ways.[1] The defendant did at one point in his conversations with the police, however, admit that he had thrown the baby into the bathtub out of sheer frustration. When questioned as to what may have caused the rib injuries, the defendant indicated that he might have grabbed the victim too firmly in an attempt to revive her.

Viewing the evidence in the light most favorable to the state, the Connecticut Supreme Court held that, while "a jury could reasonably have found that the defendant killed the baby by throwing her into the bathtub," this conclusion, "standing alone," was "insufficient to establish that the defendant had the requisite intent to cause death" to sustain a conviction for murder. *Carpenter I*, 214 Conn. at 83.

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[1] "The doctor did state that the injuries could have been caused by dropping the baby from a height of six feet or more, but not from dropping her one or two feet."

Rejecting the state's argument that the jury reasonably could have inferred an intent to cause death based on the relative strength of the petitioner as compared to the victim, the degree of force used, and the nature of the injuries inflicted; *id.,* at 84; the Connecticut Supreme Court reversed the murder conviction and remanded for sentencing on the lesser included offense of manslaughter in the first degree. *Id.,* at 85; General Statutes §53a-55(a)(3).

On remand, the trial court heard the arguments of counsel and the allocution of the petitioner, who stated:

> MR. CARPENTER: When I spoke before, it didn't seem like the Court was listening, when I said I didn't have any intent.
>
> You have to take into consideration here that I was in a state of panic. The child was not breathing. I did walk in and pick up the child and bodily slam this child and brought the child into the tub. I was in a state of panic. Everyone is using the words "thrown into the tub." I was under a state of panic. There was no intent involved. The Supreme Court said that.
>
> I was acting in a state of frustration, if that is a legal term, to stop something that is annoying. But frustration does not fit the word. Panic does and that is the way I acted. There was no intent in-

volved.

I had no intention of hurting the child. I wanted to adopt the child.

I know the Court has to do what the Court has to do. Thank you.

9/28/90 T. at 5-6.

The trial court then passed sentence on the defendant:

THE COURT: Thank you Mr. Carpenter.

This situation reminds me of a man, whom I had in New London just the other day. I listened to the argument of counsel on both sides, and I simply made a statement on the record and that is in this type of situation the Court is better off not saying anything.

I have no comment to make. I will simply impose a sentence in accordance with our Supreme Court.

I will commit the accused to the custody of the Commissioner of Correction for a period of twenty years. Costs are waived.

He should be notified that he has a right to appeal based on Mr. Williams' argument and he also has a right to sentence review.

[PROSECUTOR]: I would ask the Court to set an appeal bond.

THE COURT: Was there an appeal bond in the first case?

[PROSECUTOR]: Yes, there was.

[DEFENSE COUNSEL]: The bond the last time was five hundred thousand dollars.

THE COURT: I will set an appeal bond of two hundred thousand dollars.

The record will indicate that the defendant is being served his notice of right to sentence review and his notice of right to appeal.

9/28/90 T. at 6-7.

On March 18, 1991, the trial court articulated its sentencing rationale in a written memorandum of decision:

The State of Connecticut has moved this court to articulate its reasoning for sentencing this defendant to a term of 20 years imprisonment for manslaughter 1st degree in violation of General Statutes §53a-55(a)(3).

A jury had convicted the defendant of the crime

of Murder for which this court sentenced him to Fifty years in prison. Upon appeal, our Supreme Court remanded the matter to this court for further proceedings, *State v. Carpenter,* 214 Conn. 77. Our Supreme Court, in its wisdom, determined that a jury could not have found beyond a reasonable doubt that this defendant had the specific intent to commit murder. The matter was remanded to this court for resentencing on the charge of manslaughter in the 1st degree.

The evidence in this case proved beyond a reasonable doubt that this defendant caused the death of an eighteen month old baby. In listening to the medical testimony, it was obvious that the physical punishment inflicted on this child was monsterous [sic]. The coroner indicated in his testimony that the force needed to cause the injuries was the equivalent of droping [sic] the child from a fifth floor window. The child had a skull fracture and broken ribs. These injuries, as explained by Doctor Carver, were caused by a lethal blow to the skull of fairly great force and the rib injuries by a fairly significant force, either by a fist or violent shaking.

The injuries suffered by this victim were terrible and as a result, a defenseless child died. This was a despicable act on the part of the defendant and called for the maximum sentence allowed by law.

Pet. App. at A-19--A-11.

REASONS FOR DENYING THE PETITION

THE SENTENCE IMPOSED ON REMAND WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION AND, BECAUSE THE SENTENCE IMPOSED WAS LESS SEVERE THAN THAT ORIGINALLY IMPOSED, THE PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE WERE NOT INFRINGED

Sentencing, at its most pristine level, embodies the ancient admonition of Cicero: "Noxiae poena par esto" or "Let the punishment match the offense." De Legibus, III, 3. The maxim still informs modern concepts of sentencing and penology, whether reflected in legislative limits on courts' sentencing power or in the discretion accorded to judges and corrections officials in meting out a prescribed punishment, although all recognize that a given punishment must fit not only the crime, but the offender, as well. *Williams v. New York*, 337 U.S. 241 (1949). The broad discretion accorded to sentencing courts, therefore, recognizes the myriad of factors relevant to a given crime and defendant, a delicate task which is at once the quintessential and the most burdensome function of a jurist.

As a function of these principles, a sentencing judge

necessarily has "a wide discretion in the sources and types of evidence used to assist him in fixing the penalty within the limits prescribed by law." *Williams v. New York,* 337 U.S. at 246. But a sentencing court's discretion is subject to at least one constitutional limitation when, as here, a defendant is resentenced after a successful appeal.

In *North Carolina v. Pearce,* 395 U.S. 711 (1969) (*Pearce*), this Court recognized that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U.S. at 725. Moreover, "due process also requires that a defendant be freed of apprehension of such retaliatory motivation on the part of the sentencing judge." *Id.*; *see State v. Sutton,* 197 Conn. 485, 499, 498 A.2d 65 (1985), *cert. denied,* 474 U.S. 1073 (1986). *Pearce* established, in essence, a "prophylactic rule"; *Colten v. Kentucky,* 407 U.S. 104, 116 (1972); that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Pearce*, 395 U.S. at 726. There is, in such circumstances, a "presu-

mption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin,* 457 U.S. 368, 374 (1982). That objective information must concern "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Pearce,* 395 U.S. at 726; *Texas v. McCullough,* 475 U.S. 134, 142 (1986). "The rationale for requiring that 'the factual data upon which the increased sentence is based' be made a part of the record, of course, is that the 'constitutional legitimacy,' of the enhances sentence may thereby be readily assessed on appeal." *Wasman v. United States,* 468 U.S. 559, 565 (1984), *quoting United States v. Goodwin,* 457 U.S. at 374.

The *Pearce* presumption of vindictiveness, however, does not arise in every case where a convicted defendant receives a higher sentence on retrial, because the evil to which *Pearce* was directed was not enlarged sentences, but "vindictiveness of a sentencing judge." *Texas v. McCullough,* 475 U.S. at 138. This Court has accordingly limited the sweep of *Pearce* to reflect its underlying constitutional objective:

> Because the *Pearce* presumption may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct . . . we have limited its application, like that of other judicially created means of effectuating the rights secured by the [Constitution], to circumstances where its objectives are thought most efficaciously served.

Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 2204-05 (1989) (internal citations omitted) (internal quotations omitted). Absent a "reasonable likelihood" that an enhanced sentence is the product of actual vindictiveness on the part of the sentencing authority, it is the defendant's burden to prove actual vindictiveness. *Alabama v. Smith,* 109 S.Ct. at 2205; *Wasman v. United States,* 468 U.S. at 569.

Thus, in a variety of contexts, this Court has declined to apply the *Pearce* presumption where the underlying concern about vindictiveness is absent. *See Alabama v. Smith,* 109 S.Ct. at 2206 (greater sentence, after jury trial, than defendant would have received after withdrawn guilty plea was not vindictive even though sentences imposed by same judge); *Texas v. McCullough,* 475 U.S. at 140 (diff-

erent sentencers imposed sentence); *Wasman v. United States,* 468 U.S. 559, 569 (1984) (presumption applied to harsher sentence imposed on retrial, but intervening conviction for another crime justified trial court's action); *United States v. Goodwin,* 457 U.S. 368, 372-384 (1982) (prosecutor's pretrial modification of charges did not warrant presumption of vindictiveness); *Bordenkircher v. Hayes,* 434 U.S. 357, 362-364, *reh. denied,* 435 U.S. 918 (1978) (no due process violation in prosecutor's decision to increase charges for defendant's failure to plead guilty to originally charged offense); *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973) (fact that second jury imposed greater sentence that prior jury did not render penalty vindictive); *Colten v. Kentucky,* 407 U.S. 104 (1972) (enhanced sentence after *de novo* trial procedure was not vindictive within the meaning of *Pearce*); *but see Blackledge v. Perry,* 417 U.S. 21, 25-29 (1974) (improper for prosecutor to bring more serious charge prior to trial because of defendant's exercise of statutory right to appeal).

These principles point up the obvious, and fatal, flaw in the petitioner's claim: it is indisputable that the sentence

imposed by the trial court on remand was shorter than that imposed after his conviction for murder. Indeed, the petitioner now stands sentenced to a term of twenty years of imprisonment, rather than the fifty years to which he had been originally sentenced. Given the fact that his due process claim necessarily turns on the imposition of an enhanced sentence on remand, there is no occasion for this Court even to consider the application of the *Pearce* presumption of vindictiveness.

"Before the *Pearce* presumption of a vindictive motivation arises . . . the second sentence must, in fact, be more severe than the first." *United States v. Bay,* 820 F.2d 1511, 1513 (9th Cir. 1987). Moreover, this assessment of severity depends, not on an evaluation of individual counts, but on the sentence in the aggregate. *Id.,* at 1513. Simply stated, the petitioner did not receive a more severe sentence on remand. *See State v. McCutcheon,* 68 Ill.2d 101, 11 Ill. Dec. 278, 368 N.E.2d 886, 889 (1977) (rejecting *Pearce* claim where "defendant did not receive a more severe sentence").

Moreover, the "enhanced sentence" cases cited in the petition say nothing at all about petitioner's novel

"fractional proportion" hypothesis of sentencing.[2] Nor is the respondent aware of any reported decision discussing, let alone affirming, such a claim. There is, therefore, no indication of a conflict of authority which might otherwise warrant certiorari review. To the contrary, the judgment below reflects a well-reasoned and correct resolution of well-settled constitutional doctrine which should be left undisturbed by this Court.

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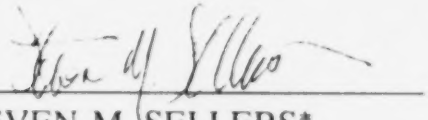
[2] Those cases are: *North Carolina v. Pearce,* 395 U.S. 711 (1969) (heavier actual sentence after retrial); *Colton v. Kentucky,* 407 U.S. 104 (1972) (heavier actual sentence after de novo trial procedure); *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973) (heavier actual sentence); *Arizona v. Rumsey,* 467 U.S. 203 (same); *Wasman v. United States,* 468 U.S. 559 (1984) (same); *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892 (1989) (heavy civil fine after criminal conviction). *See also Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201 (1989) (heavier actual sentence after vacated guilty plea); *United States v. Markus,* 603 F.2d 409 (2d Cir. 1979) (heavier actual sentence); *United States v. Albanese,* 554 F.2d 543 (2d Cir. 1977) (shorter actual sentence, but longer parole period); *United States v. Branker,* 395 F.2d 881 (2d Cir. 1968) (case has nothing to do with enhanced sentences); *United States v. Hawthorne,* 532 F.2d 318 (3d Cir. 1976) (same actual sentence; harsher parole terms); *Papp v. Jago,* 656 F.2d 221 (6th Cir. 1981) (harsher actual sentence); *United States v. Tucker,* 581 F.2d 602 (7th Cir. 1978) (same); *United States v. Gilliss,* 645 F.2d 1269 (8th Cir. 1981) (harsher parole terms); *United States v. Williams,* 651 F.2d 644 (9th Cir. 1981) (harsher overall sentence in connection with state sentence); *James v. Rodriguez,* 553 F.2d 59 (10th Cir. 1977) (heavier sentence); *State v. Leonard,* 159 N.W.2d 577 (Wis. 1968) (same).

CONCLUSION

The sentence imposed upon the petitioner is lawful, fair and well within the broad sentencing discretion of the trial court. Because the petitioner did not receive a more severe sentence on remand, there is no occasion for this Court even to consider whether the *Pearce* presumption of vindictiveness applies. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

THE STATE OF CONNECTICUT - RESPONDENT

By: 

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